(19,079.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

No. 123.

JOHN ROONEY, PLAINTIFF IN ERROR,

vs.

THE STATE OF NORTH DAKOTA.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NORTH DAKOTA.

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* * * * * * *

a–2 STATE OF NORTH DAKOTA, }
County of Cass. }

In District Court, Third Judicial District.

THE STATE OF NORTH DAKOTA }
vs. }
JOHN ROONEY, Defendant. }

Information for Murder in the First Degree.

To the district court in and for said county:

Emerson H. Smith, State's attorney in and for said county and State, in the name and by the authority of the State of North Dakota, informs this court that heretofore, to-wit: on the twenty-sixth day of August in the year of our Lord one thousand nine hundred and two, at the county of Cass, in the State of North Dakota, the defendant, John Rooney, late of the county of Cass and State aforesaid, did commit the crime of murder in the first degree, committed as follows, to-wit: That at said time and place the said defendant, together with two other persons whose names are to this informant unknown and each being then and there armed with and holding in his hand a deadly weapon, to-wit: a firearm commonly called a revolver, did, without authority of law, willfully, feloniously and with the premeditated design to effect the death of one Harold C. Sweet, then and there, said revolvers, which said revolvers were then and there loaded with metallic cartridges containing gunpowder and leaden bullets, then and there shoot off and discharge at, against and upon the said Harold C. Sweet and the body of the said Harold C. Sweet, then and there, hit, strike and penetrate with one of said leaden bullets, and did, thereby and by thus hitting, striking and penetrating the body of the said Harold C. Sweet with one of said leaden bullets then and there, without authority of law, willfully and feloniously and with the premeditated design to effect the death of the said Harold C. Sweet, inflict, cause and create in and near the back, right shoulder, right lung and right side of his the said Harold C.
3 Sweet's body certain mortal wounds and injuries, of which said mortal wounds and injuries the said Harold C. Sweet thence continually languished until later, on to-wit: the 26th day of August, 1902, he then died at, to-wit: Moorhead, Clay county, Minnesota; and so the defendant did, in manner and form and at the time aforesaid, at said county of Cass in the State of North Dakota, without authority of law, willfully, feloniously and with the premeditated design to effect his death, kill and murder the said Harold C. Sweet, this contrary to the statute in such case made and

provided and against the peace and dignity of the State of North Dakota.

And the State's attorney aforesaid, in manner and form aforesaid, in the name and by the authority of the State of North Dakota, further informs this court that heretofore, to-wit: on the twenty-sixth day of August, in the year of our Lord one thousand nine hundred and two, at the county of Cass in the State of North Dakota, the defendant, John Rooney, late of the county of Cass and State aforesaid, did commit the crime of murder in the first degree, commit-ed as follows, to-wit: That at said time and place, said defendant, John Rooney, together with two other persons whose names are to this informant unknown, did, conjointly, each being then and there armed with a deadly weapon, to-wit: a revolver loaded with metallic cartridges containing gunpowder and leaden bullets, in and upon Raymond H. Sweet, Harold C. Sweet and Wallace C. Sweet an assault feloniously make and threaten to shoot, and they, and each of them, the said Raymond H. Sweet, Harold C. Sweet and Wallace C. Sweet in fear of an immediate and unlawful injury to his person did then and there put, and then and there in manner and form aforesaid, by such assault, threats, force and fear, one watch and chain, of the value of ten dollars, of the personal property of the said Raymond H. Sweet, then and there from the person and against the will of the said Raymond H. Sweet and one watch and chain, of the value of ten dollars, of the personal property of the said Harold C. Sweet, then and there from the person and against the will of the said Harold C. Sweet, and
4–21 one watch and chain, of the value of ten dollars, of the personal property of the said Wallace C. Sweet, then and there from the person and against the will of the said Wallace C. Sweet did, conjointly and feloniously, obtain and take and the same then and there feloniously steal and carry away, and did, then and there, while so as hereinbefore shown committing the aforesaid felony, to-wit: robbery, said revolvers shoot off and discharge at, upon and against the said Harold C. Sweet and the body of the said Harold C. Sweet, then and there, hit, strike and penetrate with one of said leaden bullets, and did, thereby and by thus then and there hitting, striking and penetrating the body of the said Harold C. Sweet with one of said leaden bullets then and there, inflict, cause and create in and near the back, right shoulder, right lung and right side of his, the said Harold C. Sweet's body certain mortal wounds and injuries, of which said mortal wounds and injuries the said Harold C. Sweet thence continually languished until later on to-wit: the 26th day of August, 1902, he then died at, to-wit: Moorhead, Clay county, Minnesota: and so the said defendant did, in manner and form and at the time aforesaid, and while conjointly with said other two persons, whose names are to this informant unknown, engaged in the commission of a felony, to-wit: robbery, as hereinbefore shown, without authority of law, willfully, feloniously and with the premeditated design to effect the death of the said Harold C. Sweet,

kill and murder the said Harold C. Sweet, this contrary to the statute in such case made and provided and against the peace and dignity of the State of North Dakota.

Dated at Fargo, North Dakota, this 8th day of December, 1902.

EMERSON H. SMITH,
State's Attorney within and for Cass County, North Dakota.

* * * * * * *

22 STATE OF NORTH DAKOTA, }
County of Cass. }

In District Court, Third Judicial District.

STATE OF NORTH DAKOTA, Plaintiff, }
vs.
JOHN ROONEY, Defendant. }

This matter coming on to be heard before this court on this twentieth day of March, A. D. 1903, on motion of State's attorney in and for Cass county, for sentence and judgment upon a verdict heretofore rendered by the jury in the above entitled action, on the twenty-eighth day of January, A. D. 1903, wherein the jury rendered a verdict in substance as follows: "We, the jury empanelled to try the above entitled action, do find the defendant, John Rooney, guilty of murder in the first degree, and affix the death penalty;"

Present: The Honorable Charles A. Pollock, judge of the third judicial district and the officers of the court. The State appearing by the State's attorney, Emerson H. Smith, and the defendant appearing with his attorney, W. S. Stambaugh, Esquire, and now on motion of the State's attorney for judgment and sentence in the above entitled action, and no legal reason assigned why judgment should not now be pronounced, it is by the court,

Ordered, adjudged and decreed, that you, John Rooney, as a punishment for the offense of murder in the first degree committed by you on the twenty-sixth day of August, A. D. 1902, be conveyed to the penitentiary of the State of North Dakota, situated, and located in the city of Bismarck, in said State, and within an enclosure in said building, to be erected, for that purpose, you be by the warden of said penitentiary, or in case of his inability to act, or his absence therefrom, by the deputy warden of said penitentiary, before the hour of sunrise, on the twenty-sixth day of June, A. D. 1903, you be hanged by the neck until you are dead.

Dated March 20th, A. D. 1903.

By the court,

CHAS. A. POLLOCK, *Judge.*

(Endorsement: Filed in the office of clerk of district court, Cass Co. N. Dak. March 20th 1903 E. C. Sargent clerk by W. H. Aymer, deputy.)

23 STATE OF NORTH DAKOTA, }
County of Cass. }

In District Court, Third Judicial District.

STATE OF NORTH DAKOTA, Plaintiff, }
vs.
JOHN ROONEY, Defendant. }

Warrant.

The State of North Dakota to the sheriff of Cass county, North Dakota, or his deputy duly appointed, and to the warden, or, in case of his death, inability, or absence, to the deputy warden of the penitentiary of the State of North Dakota, at Bismarck, or to the person or persons duly authorized by law to perform the execution of persons sentenced to death within said State, Greeting:

You are hereby commanded and directed within ten days from the date hereof, in as private and secure a manner as possible to be done, to convey John Rooney, the above named defendant, to the North Dakota penitentiary, at Bismarck, where he shall be received by the warden of the same, and securely kept until Friday, the 26th day of June, A. D. 1903, and on said date, to-wit, Friday, June 26th, 1903, before the hour of sunrise of said day, within an enclosure to be prepared for that purpose within the walls of the North Dakota penitentiary, at Bismarck, to hang the said defendant John Rooney by the neck until he is dead.

Hereof fail not at your peril.

Done in open court this 20th day of March, A. D. 1903.

By the court:

CHAS. A. POLLOCK, *Judge.*

Attest: E. C. SARGENT,
Clerk District Court, Cass County, North Dakota. [SEAL.]

24 STATE PENITENTIARY,
BISMARCK, NORTH DAKOTA, *March 21st*, 1903.

To the State auditor.

SIR: I have this day received from Treadwell Twichell, sheriff of Cass county, attended by the following named guard: L. L. Twichell, the following named convict: John Rooney, sentenced to imprisonment in this penitentiary.

Crime, murder; penalty, death sentence.

N. F. BOUCHER, *Warden,*
Per MABEL BOUCHER.

25 STATE OF NORTH DAKOTA, }
County of Cass. }

In District Court, Third Judicial District.

STATE OF NORTH DAKOTA }
vs. }
JOHN ROONEY, Defendant. }

Upon reading and filing the annexed petition of Emerson H. Smith, and the court being fully advised in the matter, it is

Ordered, that the defendant be brought before this court on the 31st day of March, A. D. 1903, at the court house in the city of Fargo, at the hour of ten a. m., and then and there show cause if any there be, why said judgment as heretofore pronounced should not be vacated and set aside, and sentence be passed and judgment entered in conformity with the law of March ninth, A. D. 1903.

It is further ordered, that this notice be served upon Honorable W. S. Stambaugh and upon the defendant personally, not later than March 30th, A. D. 1903.

Done in open court this twenty-seventh day of March, A. D. 1903.

By the court:

CHAS. A. POLLOCK, *Judge.*

STATE OF NORTH DAKOTA, }
County of Cass. }

In District Court, Third Judicial District.

STATE OF NORTH DAKOTA }
vs. }
JOHN ROONEY, Defendant. }

Your petitioner, Emerson H. Smith, respectfully shows to this court, that he is the duly elected, qualified and acting State's attorney in and for Cass county, North Dakota, and has been ever since the seventh day of January, A. D. 1901. That on the ninth day of December, A. D. 1902, he filed in the office of the clerk of the district court, an information in writing, charging the defendant John Rooney with the crime of murder in the first degree.

That thereafter and on the twenty-second day of January, A. D. 1903, the above entitled action was brought on for trial be-
26 fore a jury duly empanelled to try said case.

That thereafter and on the twenty-eighth day of January, A. D. 1903, the jury duly empanelled, rendered a verdict in the following form,

" We, the jury empanelled and sworn to try the above entitled action, did find the defendant, John Rooney, guilty of murder in

the first degree, as he stands charged in the information, and we hereby fix and determine that the defendant shall be punished by death.

Dated January twenty-eighth, 1903.

JOHN REED, *Foreman.*"

That thereafter and on the twentieth day of March, A. D. 1903, on motion of the State's attorney for judgment and sentence in the above entitled action, and upon the verdict above recited, the court then and there imposed the following sentence;

"That you, John Rooney, as a punishment of the offence of murder in the first degree, committed by you on the twenty-sixth day of August, A. D. 1902, be conveyed to the penitentiary of the State of North Dakota, situated and located in the city of Bismarck, and in said penitentiary, within an enclosure in said building, to be erected in said building, be by the warden of said penitentiary or in case of his inability, or his absence therefrom, by the deputy warden of said penitentiary, before the hour of sunrise, on the twenty-sixth day of June, A. D. 1903, you be hanged by the neck until you are dead.

Dated March twentieth, A. D. 1903.

By the court:

CHARLES A. POLLOCK, *Judge.*"

That your petitioner respectfully shows to this court that on the ninth day of March, A. D. 1903, and before the date of sentence and judgment herein, there was approved by the governor of the State of North Dakota, a certain bill that had been introduced and passed by the legislature of the State of North Dakota, requiring execution of the death penalty to take place at the State penitentiary at Bismarck. That among other provisions of said bill, the execution of a person, charged with murder in the first degree, wherein the death penalty was inflicted, could not be executed until six months from the date of the passing of sentence and judgment. That under the conditions of the bill as above recited, the sentence heretofore pronounced by this court and the judgment entered
27 pursuant thereto, was ineffective, in this: that the execution was ordered to take place in a shorter time than provided by said bill.

Wherefore, your petitioner prays that the defendant may be brought before this court at a time and place to be named by this court, for the purpose of modifying said judgment and sentence heretofore pronounced and entered, changing and enlarging the time in which such execution of said defendant shall take place, and that said judgment as entered and said sentence as passed, be vacated and set aside.

EMERSON H. SMITH.

Subscribed and sworn to before me this 21st day of March, A. D. 1903.

[SEAL.] SANFORD F. REESE,
Notary Public for Cass County, N. D.

My commission expires March 4th, 1909.

STATE OF NORTH DAKOTA, }
County of Cass. }

In District Court, Third Judicial District.

STATE OF NORTH DAKOTA }
vs. }
JOHN ROONEY, Defendant. }

The above entitled matter coming on to be heard before this court on this 31st day of March, A. D. 1903, on motion of the State's attorney in and for Cass county, for sentence and judgment upon a verdict heretofore rendered by the jury in the above entitled action on the 28th day of January, A. D. 1903, wherein the jury rendered a verdict in substance as follows: "We, the jury, empanelled to try the above entitled action, do find the defendant, John Rooney, guilty of murder in the first degree, and affix the death penalty."

Present: The Honorable Charles A. Pollock, judge of the third judicial district, and the officers of the court. The State appearing by the State's attorney, Emerson H. Smith, Esq., and the assistant State's attorney, W. H. Barnett, Esq., and the defendant appearing in person and with his attorney, W. S. Stambaugh, Esq., and
28 the judgment and sentence which was erroneously and inadvertently entered herein March 20, 1903, having been, upon due notice to defendant and his counsel, at this time in open court vacated and set aside,

Now the State's attorney moves for judgment and sentence in the said action, and the defendant being asked to state if he has any legal reason to assign why judgment should not now be pronounced, through his counsel makes answer as follows:

"Yes sir, if your honor please, the defendant as a reason why sentence should not be pronounced against him upon the verdict in this case, says, first that the law providing the penalty for the offense with which he is charged in this case, which was in force at the time the offense is alleged to have been committed, has been repealed, without any saving clause. Second, the law of March 9, 1903, providing the punishment for the offense with which the defendant is charged in this case is *ex post facto* and null and void. And, third, that under the judgment and sentence heretofore passed and entered in this case, the execution of that judgment had been commenced, and this defendant confined in the penitentiary under that judgment, in close confinement."

And the court having heard the said motion, objections and the arguments thereon by counsel for both parties, and being fully advised in the premises, now orders that said application and motion to discharge the defendant without pronouncing judgment be and the same is hereby denied.

And upon a renewal of the motion for judgment by the State's attorney, it is by the court,

Ordered, adjudged and decreed, that you, John Rooney, as a punishment for the offence of murder in the first degree, committed by you on the twenty-sixth day of August, A. D. 1902, and of which you stand convicted in this court, within ten days from the date hereof, be conveyed to the penitentiary of the State of North Dakota, situated and located in the city of Bismarck, in said State, there to be kept in close confinement until October ninth, 1903, and within an enclosure in said building, to be erected for that purpose within the walls of said penitentiary, by the warden of said penitentiary, or in case of his inability to act or his absence therefrom, by the deputy warden of said penitentiary, before the hour of sunrise, on the ninth day of October, A. D. 1903, you be hanged by the neck until you are dead. And may the Lord have mercy on your soul.

29–42

To which orders, judgment and sentence, counsel for defendant objects and excepts, which exception is allowed and made a part of the record.

Dated March 31st, 1903.

By the court:

CHAS. A. POLLOCK, *Judge.*

* * * * * * *

43 District Court, Cass County, North Dakota, February Term, A. D. 1903.

MARCH 20TH, 1903.

Court convened pursuant to adjournment at 2 o'clock p. m.

Present: Hon. Chas. A. Pollock, judge presiding, and the officers of the court.

Court was duly opened.

STATE OF NORTH DAKOTA, Plaintiff,
vs.
JOHN ROONEY, Defendant.

This matter coming on to be heard before this court, on motion of Emerson H. Smith, State's attorney in and for the county of Cass, State of North Dakota, for sentence and judgment upon a verdict heretofore rendered by the jury in the above entitled action, on the 28th day of January, A. D. 1903, wherein the jury rendered a verdict of guilty of murder in the first degree, and affixed the death penalty.

And the defendant appearing in person and W. S. Stambaugh, his attorney.

Now, on motion of said State's attorney for judgment and sentence in the above entitled action; now at this time the court asks defendant if he had any legal reason to show why judgment should not now be pronounced, and no legal reason being shown, it is, by the court,

44 Ordered, adjudged and decreed, that you, John Rooney, as a punishment for the crime of murder in the first degree, committed by you on the 26th day of August A. D. 1902, be conveyed to the penitentiary of the State of North Dakota, situated and located in the city of Bismarck, in said State, and within an enclosure in said building, to be erected, for that purpose, you be by the warden of said penitentiary, or in case of his inability to act, or his absence therefrom, by the deputy warden of said penitentiary, before the hour of sunrise, on the 26th day of June, A. D. 1903, you be hanged by the neck until you are dead.

Defendant is remanded to the custody of the sheriff.

District Court, Cass County, North Dakota, February Term, A. D. 1903.

MARCH 27TH, 1903.

Court convened pursuant to adjournment at 9:30 o'clock, a. m.

Present: Hon. Chas. A. Pollock, judge presiding, and the officers of the court.

Court being duly opened.

STATE OF NORTH DAKOTA, Plaintiff,
vs.
JOHN ROONEY, Defendant.

And now at this time, in open court, the State's attorney by affidavit duly filed calls the attention of the court to an irregularity in the sentence of the above named defendant John Rooney, all of which appears upon the fact of the judgment and sentence in said action, which occurred at this present term of court on the 20th day of March, 1903, in this, to-wit: that the said judgment and sentence required the execution of the said Rooney to take place on Friday, the 26th day of June, 1903, and was rendered under the provisions of section 8305, of the Revised Codes of 1899;

Whereas the said section 8305 was amended by the present legislature by an act approved March 9th, 1903, and which on that day became a law, so that "The date of execution must not be less than six months after the day in which the judgment is entered,

45 and not longer than nine months thereafter," from which judgment upon the face thereof it manifestly appears that the judgment of the court heretofore rendered was irregular and void; therefore, upon motion of the State's attorney, it is now

Ordered, that a bench warrant issue directed to the sheriff of Cass county, North Dakota, and to the warden of the penitentiary of said State, requiring the sheriff to forthwith proceed to Bismarck and take the said Rooney and return him to the county jail of said Cass county, to be resentenced in due compliance with law; and the warden of the said penitentiary is hereby directed and commanded to turn over to the sheriff of said Cass county the person of the said defendant, John Rooney, to be returned to Cass county, as aforesaid.

Dated March 27th, 1903.

By the court:

CHAS. A. POLLOCK, *Judge.*

District Court, Cass County, North Dakota, February Term, A. D. 1903.

MARCH 31ST, 1903.

Court convened pursuant to adjournment at 10 o'clock a. m.

Present: Hon. Chas. A. Pollock, judge presiding, and the officers of the court.

Court was duly opened.

STATE OF NORTH DAKOTA, Plaintiff,
vs.
JOHN ROONEY, Defendant.

Now comes W. H. Barnett, assistant State's attorney in and for Cass county, North Dakota, this being the time fixed for the hearing of the order to show cause why the judgment pronounced by the court on March 20th, 1903, in the above entitled action should not be vacated and set aside.

Defendant being present with his counsel W. S. Stambaugh, Esq., in open court.

Now W. H. Barnett, assistant State's attorney, moves the court to vacate and set aside said judgment on the ground and for the reason that said judgment was void.

46 Now counsel for defendant states to the court that he had nothing to say against the said judgment being set aside and vacated.

Whereupon the court grants said motion, and vacates and sets aside said judgment.

Now at this time assistant State's attorney moves the court to pronounce judgment upon John Rooney, defendant, in accordance with the verdict returned January 28th, 1903, and according to the law approved March 9th, 1903.

Now the court asks defendant if he had any legal cause to show why judgment should not be pronounced against him;

Now comes W. S. Stambaugh, counsel for defendant, and presents to the court legal reasons why judgment should not be pronounced upon defendant at this time, as follows: "Yes sir, if your honor

please, the defendant, as a reason why judgment should not be pronounced against him upon the verdict in this case, says,

First. That the law providing the penalty for the offense with which he is charged in this case, which was in force at the time the offense is alleged to have been committed, has been repealed, without any saving clause.

Second. The law of March 9th, 1903, providing the punishment for the offense with which the defendant is charged in this case is *ex post facto*, and null and void; and,

Third. That under the judgment and sentence passed and entered in this case, the execution of that judgment had been commenced and this defendant confined in the penitentiary under that judgment, in close confinement."

Now the court hears the arguments of counsel for both parties.

Now defendant is remanded to the custody of the sheriff.

Now court takes recess until 4 o'clock p. m.

Court reconvened after recess at 4 o'clock p. m., with all the officers of the a. m. present.

STATE OF NORTH DAKOTA, Plaintiff,
vs.
JOHN ROONEY, Defendant.

47 & 48 State's Attorney Emerson H. Smith and W. H. Barnett, assistant State's attorney, being present.

Defendant, with his counsel, W. S. Stambaugh, being also present.

The assistant State's attorney states to the court that after consultation with Emerson H. Smith, State's attorney, they had decided to submit the case to the court without further argument. Now the court having heard the motion, objections and the arguments thereon, by counsel for both parties, and being fully advised in the premises, now

Orders, that said application and motion to discharge the defendant without pronouncing judgment be and the same is hereby denied.

The court in overruling the objections of counsel for defendant, delivered his written opinion which opinion is filed as a part of the record in the case, and proceeded to pronounce judgment, with the defendant standing at the bar of the court, in words as follows, viz:

It is by the court, ordered, adjudged and decreed, that you, John Rooney, as a punishment for the offense of murder in the first degree, committed by you on the twenty-sixth day of August, A. D. 1902, and of which you stand convicted in this court, within ten days from the date hereof, be conveyed to the penitentiary of the State of North Dakota, situated and located in the city of Bismarck, in said State, there to be kept in close confinement until October ninth, 1903, and within an enclosure in said building, to be erected for that purpose within the walls of said penitentiary by the warden of said penitentiary, or in case of his inability to act, or his absence

therefrom, by the deputy warden of said penitentiary, before the hour of sunrise, on the ninth day of October, A. D. 1903, you be hanged by the neck until you are dead. And may the Lord have mercy on your soul.

To which orders, judgment and sentence, counsel for defendant objects and excepts, which exception is allowed and made a part of the record.

Dated March 31st, 1903.

By the court:

CHAS. A. POLLOCK, *Judge.*

* * * * * * *

49 On the 2nd day of May, A. D. 1903, at page 487 of the Minute Record of the supreme court of the State of North Dakota, as contained in Minute Record Book B, there appears the following language:

Now the court called for argument.

STATE OF NORTH DAKOTA, Respondent,
vs.
JOHN ROONEY, Appellant. } File No. 1110.

Appearances: For the appellant, W. S. Stambaugh; *contra*, W. H. Barnett, assistant State's attorney for Cass county.

Cause argued, submitted and taken under advisement.

On the 24th day of June, A. D. 1903, there was filed in this office an order in said cause, which order is in words and figures as follows, to wit:

50 STATE OF NORTH DAKOTA, } *ss:*
In the Supreme Court,

STATE OF NORTH DAKOTA, Plaintiff and Respondent,
vs.
JOHN ROONEY, Defendant and Appellant. } File No. 1110.

Appeal from the district court of Cass county.

This action coming on to be heard at the March, A. D. 1903, term of this court, at the supreme court room, in the city of Bismarck, State of North Dakota:

Present: N. C. Young, chief justice; D. E. Morgan and J. M. Cochrane, associate justices, and the appeal herein having been argued by W. S. Stambaugh for the appellant, and by W. H. Barnett for respondent, and the court having advised thereon, it is now here considered, ordered and adjudged, that the judgment of the said district court within and for said Cass county, appealed from herein, be and the same is hereby affirmed.

And it is further ordered, that this cause be and it is hereby remanded to the district court for further proceedings according to law, and the judgment of this court.

Dated June 24, 1903.

By the court,

N. C. YOUNG,
Chief Justice.

[Seal of the Supreme Court of North Dakota.]

Attest:
R. D. HOSKINS, *Clerk.*

51–73 [Endorsed:] File No. 1110 In the supreme court State of North Dakota State, plaintiff and respondent, *vs.* Rooney, defendant and appellant. Filed in court this 24 day of June, 1903. R. D. Hoskins, clerk.

* * * * * * *

74 In the Supreme Court of the United States.

JOHN ROONEY, Plaintiff in Error,
vs.
THE STATE OF NORTH DAKOTA, Defendant in Error. } Assignment of Errors.

Statement of Errors on Which Plaintiff in Error Intends to Rely.

That in and by the said record and proceedings it appears that the judgement of the supreme court of the State of North Dakota which affirmed the judgement and sentence of the district court of said State in and for the county of Cass, and was rendered and given against the said John Rooney, should have been rendered and given in his favor, and should have reversed said judgement and sentence of the said district court of the State of North Dakota.

1. Because said judgement and sentence of said district court so as aforesaid affirmed by said supreme court was not authorized by the law in force at the time of the commission of the crime upon which said judgement was rendered, and for the punishment of which said sentence was imposed.

2. Because said judgement so rendered and sentence so imposed were rendered and imposed under and in pursuance to a statute of the State of North Dakota passed after the commission of said crime.

75 3. Because said statute under and pursuant to which said judgement was rendered and said sentence imposed inflicts upon the said John Rooney a different and greater punishment than the law annexed to said crime at the time it was committed, and alters the situation of the said John Rooney to his disadvantage.

4. Because said judgement rendered and sentence imposed inflict upon the said John Rooney a different and greater punishment than the law annexed to said crime at the time it was committed, and alters the situation of the said Rooney to his disadvantage.

5. Because said law under and pursuant to which said judgement was rendered and said sentence imposed is *ex post facto* as to said crime and as to said Rooney, and void.

Portions of Record Designated to be Printed by Plaintiff in Error.

Print pages 2, 3, and 4, down to and including words "for Cass county, North Dakota," pages 22, 23, 24, 25, 26, 27, 28, and 29, page 43 commencing at the words "district court, Cass county, North Dakota," pages 44, 45, 46, 47, 49, 50 and 51.

To the above named defendant and Emerson H. Smith and W. H. Barnett, its attorneys:

You will please take notice that the foregoing is a statement of the errors on which plaintiff in error intends to rely, and a designation and statement of the parts of the record which he thinks necessary for the consideration thereof.

Dated Sept. 23rd, 1903.

SETH NEWMAN,
B. F. SPALDING,
Att'ys for Pl'ff in Error.

76 Due service of the above and foregoing statement and notice by copy admitted this 23rd day of September, 1903.

EMERSON H. SMITH &
W. H. BARNETT,
Att'y- for Def't in Error.

[Endorsed:] Original. In the Supreme Court of the United States. John Rooney, plaintiff in error, against The State of North Dakota, defendant in error. Notice and statement of errors relied on and designation of parts of record to be printed.

77 [Endorsed:] File No. 19,079. Supreme Court U. S., October term, 1903. Term No. 428. John Rooney, pl'ff in error, *vs.* The State of North Dakota. Statement of errors & designation of parts of record P. E. desires printed. Filed Oct. 30", 1903.

Endorsed on cover: File No. 19,079. North Dakota supreme court. Term No. 123. John Rooney, plaintiff in error, *vs.* The State of North Dakota. Filed September 28, 1903. File No. 19,079.

FILE COPY.

Office Supreme Court U. S.
FILED
AUG 22 1904
JAMES H. McKENNEY,
Clerk.

Supreme Court of the United States.

No. 123.

JOHN ROONEY,

Plaintiff in Error.

vs.

THE STATE OF NORTH DAKOTA,

Defendant in Error.

Brief of Plaintiff in Error.

SETH NEWMAN,

B. F. SPALDING,

Attorneys for Plaintiff in Error.

Supreme Court of the United States.

JOHN ROONEY,

Plaintiff in Error.

vs.

THE STATE OF NORTH DAKOTA,

Defendant in Error.

BRIEF OF PLAINTIFF IN ERROR.

STATEMENT OF CASE.

December 9th, 1902, information was filed in the office of the Clerk of the District Court of Cass County, North Dakota, charging John Rooney with having on the 26th day of August 1902 committed the offense of murder in the first degree, by shooting and killing one Harold C. Sweet while engaged in the commission of the crime of robbery in the first degree.

On the same day the accused pleaded not guilty.

The case was tried in January 1903 and on the 28th day of that month the Jury returned a verdict finding him guilty of murder in the first degree, as charged, and determining that he should be punished by death. March 20th, 1903, judgment and sentence were pronounced, that the plaintiff in error be conveyed to the penitentiary of the State of North Dakota at Bismarck, in said State, and there on the 26th day of June 1903 be, by the Warden or his deputy, hanged by the neck until dead.

It being discovered that a mistake had been made in fixing the date on which the execution should take place, in that the Statute of March 9th, 1903, under which the sentence was passed, provided that the execution should not take place until six months from the date of the judgment and sentence, and upon notice to show cause, on March 31st the judgment and sentence of March 20th were vacated and set aside, and plaintiff in error was sentenced to be conveyed to the penitentiary of the State of North Dakota, in the City of Bismarck in said State, there to be kept in close confinement until October 9th, 1903, and on that day be, by the Warden or his deputy, hanged by the neck until dead.

To this judgment and sentence plaintiff in error, by his attorney, objected and excepted, and the exception was allowed and made a part of the record.

Rooney perfected an appeal to the Supreme Court of the State of North Dakota, briefs were filed and oral arguments made for both sides, and on June 24th, 1903, the judgment of the District Court was affirmed by that Court.

SPECIFICATION OF ERRORS.

That in and by the said record and proceedings it appears that the judgment of the Supreme Court of the State of North Dakota which affirmed the judgment and sentence of the District Court of said State in and for the County of Cass, and was rendered and given against the said John Rooney, should have been rendered and given in his favor, and should have reversed said judgment and sentence of the said District Court of the State of North Dakota.

1.—Because said judgment and sentence of said District Court so as aforesaid affirmed by said Supreme Court was not authorized by the law in force at the time of the commission of the crime upon which said judgment was rendered, and for the punishment of which said sentence was imposed.

2.—Because said judgment so rendered and sentence so imposed were rendered and imposed under and in pursuance to a statute of the State of North Dakota passed after the commission of said crime.

3.—Because said statute under and pursuant to which said judgment was rendered and said sentence imposed inflicts upon the said John Rooney a different and greater punishment than the law annexed to said crime at the time it was committed, and alters the situation of the said John Rooney to his disadvantage.

4.—Because said judgment rendered and sentence imposed inflict upon the said John Rooney, a diffierent and greater punishment than the law annexed to said crime at the time it was committed, and alters the situation of the said Rooney to his disadvantage.

5.—Because said law under and pursuant to which said judgment was rendered and said sentence imposed is ex post facto as to said crime and as to said Rooney, and void.

ARGUMENT.

The statutes in force August 26th, 1902, fixing the punishment for murder in the first degree, the time, the manner and by whom the death penalty should be executed are as follows:

Revised Codes of North Dakota, 1899—

Section 7068. *Punishment for murder in first degree.* Every person convicted of murder in the first degree shall suffer death or be imprisoned in the penitentiary for life.

Section 7072. *Jury determines degree of murder.* The jury before whom any person prosecuted for murder is tried, shall, if they find such person guilty thereof, determine by their verdict, whether it is murder in the first degree or of murder in the second degree.

Section 7073. *Jury must determine punishment.* The jury before whom any person prosecuted for murder is tried, shall if they find such person guilty thereof, fix and determine by their verdict, the punishment to be inflicted, within the limits prescribed by law, * * * *

Section 8305. *Judgment of death. Warrant to execute.* When judgment of death is rendered, the judge must sign and deliver to the sheriff of the county, a warrant duly attested by the clerk under the seal of the court, stating the conviction and judgment, and appointing a day on which the judgment is to be executed, which must not be less than three months after the day in which the judgment is entered, and not longer than six months thereafter.

Section 8319. *How punishment of death inflicted.* The punishment of death must be inflicted by hanging the defendent by the neck until he is dead.

Section 8320. *In what jail defendent kept.* When there is no jail within the county, or whenever the officer having in charge any person under judgment of death, deems the jail of the county where the conviction was had, insecure, unfit or unsafe for any cause, such officer may confine such person in the jail of any other convenient county of the state and the jailer of any such convenient county shall receive and keep such person in the same manner as if he had been delivered to him by an officer of his own county; and the county in which said person was convicted shall pay all expenses of keeping and maintaining him in said jail.

Section 8321. *Where judgment of death executed.* A judgement of death must be executed within the walls or yard of the jail of the county in which the conviction was had, or within some convenient enclosure within said county.

Section 8322. *Execution. Who must or who may be preseut.* A judgement of death must be executed by the sheriff of the county

where the conviction was had, or by his deputy, one of whom at least must be present at the execution. * * * *

The provisions of Chapter 99 Laws of North Dakota 1903, page 119, under which plaintiff in error was sentenced, in so far as they are necessary for the decision of this case, are as follows:

Section 1. *Death penalty. How inflicted. Where.* The mode of inflicting the punishment of death shall be by hanging by the neck until the person is dead; and the warden of the North Dakota penitentiary, or in case of his death, inability or absence, the deputy warden shall be the executioner; and when any person shall be sentenced, by any court of the state having competent jurisdiction, to be hanged by the neck until dead, such punishment shall only be inflicted within the walls of the North Dakota penitentiary at Bismarck, North Dakota, within an enclosure to be prepared for that purpose under the direction of the warden of the penitentiary and the board of trustees thereof, which enclosure shall be higher than the gallows, and so constructed as to exclude public view.

Section 2. *Trial judge to fix date of execution. Compensation of executioner.* All executions of the death penalty by hanging

shall take place according to the provisions of this act, and on the day designated by the judge passing sentence, but before the hour of sunrise of the designated day, and the warden or deputy warden executing the sentence shall receive for his services twenty-five dollars, which amount shall be in addition to other compensation allowed said warden or deputy warden by law.

Section 3. *Duty of Sheriff. Fees.* When a person is sentenced to death, all writs for the execution of the death penalty shall be directed to the sheriff by the Court issuing the same, and the sheriff of the county wherein the prisoner has been convicted and sentenced, shall, within the next ten days thereafter, in as private and secure a manner as possible to be done, convey the prisoner to the North Dakota penitentiary, where the said prisoner shall be received by the warden, superintendent or keeper thereof, and securely kept in close confinement until the day designated for the execution, * * * *

Section 14. *Amendment.* That section 8305 of the revised codes of 1899, relating to judgment of death, warrant to execute, be amended so as to read as follows:

Section 8305. *Judgment of death. Warrant to execute.* When the judgment of death is rendered the judge must sign and

deliver to the sheriff of the county a warrant duly attested by the clerk under the seal of the court, stating the conviction and judgment and appointing a day upon which the judgment is to be executed, which must not be less than six months after the day in which the judgment is entered, and not longer than nine months thereafter.

Section 16. *Repeal.* All acts and parts of acts in conflict with the provisions of this act are hereby repealed.

Section 17. *Emergency.* Whereas, an emergency exists in this, that there are now several persons in the state under sentence of death before the first of July, 1903, and if the said persons are executed according to the existing laws the erection of several scaffolds will be necessary, which will entail considerable cost, therefore, this act shall take effect and be in force from and after its passage and approval. Approved March 9th 1903.

Section 5142, Revised Codes, N. Dak., 1899, is a general savings clause, but the Supreme Court of the State in this case holds that the statute of March 9th, 1903, expressly provides that it shall have the effect to extinguish the penalty fixed by the statute in force at the time Rooney's offense was committed. The statute is as follows:

"Sec. 5142. *Effect of repeal.* The repeal of any statute by the legislative assembly shall not have the effect to release or extinguish any penalty, forfeiture or liability incurred under such statute, unless the repealing act shall so expressly provide and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture or liability."

The statutes of North Dakota regulating imprisonment in the penitentiary are as follows:

"Sec. 8304. *Imprisonment in penitentiary is at hard labor.* In all cases when by law a person is sentenced to imprisonment in the penitentiary, it shall be at hard labor, whether so designated by the jury or court or not."

"Sec. 8546. *Employment and discipline of inmates of penitentiary.* All persons sentenced to the punishment of imprisonment in the penitentiary and committed thereto shall be constantly employed for the benefit of the state. No communication shall be allowed between such persons and any person without the penitentiary except under such supervision as may be prescribed by the rules and regulations thereof. No person shall, without the consent of the warden, bring into or carry out any writing or any information to or from any inmate of the penitentiary. Persons committed to the penitentiary shall be confined in separate cells at night, whenever there are cells sufficient, and in the daytime all intercourse between them shall be prevented as far as practicable. All communications between male and female inmates shall be prevented."

Section 10, Art. 1, Constitution of the United States, "No State * * * shall pass any * * * ex post facto law, * * *

The difference between the punishment for murder in the first degree, where the death penalty is determined upon by the jury, under the law in force when this offense was committed, and the punishment fixed by the statute of March 9th, 1903, is:

1. Three months are added to the term of imprisonment before the execution.

2. Under the former law the imprisonment before the execution, in case there was no jail in the county, in which the conviction was had, or where the jail in such county was deemed insecure, unfit or unsafe, was in another convenient county in the state.

Under the latter law such imprisonment is in the penitentiary of the state, and in close confinement.

3. Under the former law the defendant was to be executed in the county in which he was convicted, by the sheriff of such county, or his deputy. Under the latter law, the defendant is to be executed at the penitentiary of the state by the warden or his deputy.

The plaintiff in error was sentenced under statute of March 9th, 1903.

Record P. P. 7 & 8.

Is the statute under which judgment was entered and sentence pronounced, as applied to plaintiff in error, and the crime of which he was convicted, ex post facto and void? This is the sole question in this case.

Section 8305. Revised Codes N. Dak., 1899 provides that the day appointed on which the judgment of death shall be executed * * "must not be less than three months after the the day in which the judgment is entered, and not longer than six months thereafter."

This section, as amended by section 14 of the statute of March 9th, 1903, provides that the day appointed on which the judgment of death shall be executed "must not be less than six months after the day in which the judgment is entered, and not longer than nine months thereafter."

If the imprisonment under the latter statute was to be in the county jail, as under the former, the statute would be ex post facto, because the punishment is increased by the three months added imprisonment. If three months could be added, three years or any number of years could be added to the term of inprisonment.

"No one can be criminally punished in this country, except according to the law prescribed for his government by the sovereign authority before the imputed offense was committed, or by some law passed afterwards by which the punishment is not increased."

Ex Parte Medley, 134 U. S. 106, L. Ed. Book 33 P. 835.

The Supreme Court of California in People v. McNulty, discussing the law as settled by this Court, and quoted above says:—

"By reference to section 1217 of the Penal Code above quoted, and the proposed amendment, it will be seen that the effect of the amendment, if valid, would be to change the period within which the execution must take place from not less than 30 nor more than 60 days to not less than 60 nor more than 90 days after judgment, the result of which is that under the amendment a convict might be kept alive and in dread and apprehension of a painful and ignominious death for 30 days longer than he could have been so kept under the old law. This change, also, it is strenously argued, and apparently not without authority to sustain the contention, makes the law ex post facto. For, in the first place, it is said that, although by a vast majority of persons condemned to die on the scaffold any postponement of the date of execution would be eagerly welcomed as a boon, there may be some men to whom it would be an aggravation of their suffering. And in the next place, it is contended that, even if this were not so, the principle that courts and legislatures may be allowed to change the punishment of crimes ex post facto in such manner as in their opinion renders the penalty lighter cannot be admitted without destroying the value of the constitutional guaranty, because there could be no certainty that the legislative or judicial discretion would always be wisely and mercifully exercised; and neither the legislator nor the judge is to be allowed to

measure the feelings of the culprit by his own. In short, the cases have gone to the extent of holding that a law which changes the punishment of past offenses in any manner whatever except by remitting a separable portion of the penalty previously prescribed, i. e., by reducing the amount of the fine, the number of stripes; the term of imprisonment, etc., is necessarily void as to all such offenses. It is unnecessary however, to cite or to criticize the cases in which this matter has been considered by courts whose decisions do not bind us as authority, when we have a decision of the Supreme Court of the United States, which is clearly in point.

People v. McNulty, 28th Pac., 816 (Cal).

Section 830, Revised Codes N. Dak., 1899, provides, "When there is no jail within the county, or whenever the officer having in charge any person under judgment of death, deems the jail of the county where the conviction was had, insecure, unfit or unsafe for any cause, such officer may confine such person in the jail of any other convenient county of the state, and the jailer of any such, convenient county, shall receive and keep such person in the same manner as if he had been delivered to him by an officer of his own county." * * * *"

We suppose that when there was a jail in the county in which the conviction was had, which was not deemed insecure, unfit or unsafe for any cause, a person under judgment of death, could have been confined in such jail. This, however is the only statute upon the subject and does not directly so provide.

Section 3 of the act of March 9th, 1903 provides that persons sentenced to death shall, within ten days thereafter, be conveyed to the North Dakota penitentiary, "and securely kept in close confinement until the day designated for the execution * *."

Imprisonment in the penitentiary as compared with imprisonment in the county jail is an increased and greater punishment.

"Instead of confinement in the ordinary county prison of the place where he and his friends reside; where they may, under the control of the sheriff, see him and visit him; where the sheriff and his attendants must see him; where his religious adviser and his legal counsel may often visit him without any hindrance of law on the subject, the convict is transferred to a place where imprisonment always implies disgrace and which, as this court has judicially decided, in Ex Parte Wilson, 114 U. S. 417 (29: 909); Parkinson v. U. S. 121 U. S. 281 (30: 959), and U. S. v. Dewitt 128 U. S. 393 (32; 485), is itself an infamous punishment, * * *."

Ex Parte Medley 134 U.S. 106 L. Ed Book 33 P. 835.

In People v. McNulty 28 Pac. 816 (Cal.) discussing this question and quoting the above language from the Medley case, this is said:—

"We have seen that under the amendments of 1891 a person convicted of murder in the first degree and sentenced to death must within 10 days thereafter be delivered

to the warden of the state prison, and be confined by him for from 50 to 80 days in said prison. If it is in the power of the legislature to add to the penalty of death by hanging a previous imprisonment in the penitentiary for 80 days, the term, might under the same power, be extended to years."

The statute of California considered in People v. McNulty, changed the punishment from imprisonment in the jail not less than 30 nor more than 60 days, to imprisonment in the penitentiary not less than 60 nor more than 90 days, and the prisoner was to be conveyed to the penitentiary within 10 days from the time of judgment.

Justice Harrison, writing the dissenting opinion says:—"I regret that I am unable to concur in the foregoing opinion and judgment. I concur in that portion thereof which holds that the effect of the amendments of 1891 is to make such a change in the punishment prescribed for murders committed prior to their enactment as to bring them within the definition of an ex post facto law, and therefore, that the punishment therein prescribed cannot be inflicted upon the defendant."

Under the act of March 9, 1903, under which judgment was entered against plaintiff in error, the imprisonment in the penitentiary is in close confinement. The statute provides that the prisoner shall be "securely kept in close confinement until the day designated for the execution, * * *."

We contend that close confinement, as compared with imprisonment in the county jail, is added, increased and more severe punishment. What "close confinement," as here used, means, does not so much depend upon the technical construction of the words themselves, as upon the character of the prison in which the prisoner is confined. Section 8304 R. C. N. Dak., 1899, provides "In all cases when by law a person is sentenced to imprisonment in the penitentiary, it shall be at hard labor, whether so designated by the jury or court or not."

Section 8546, R. C., N. Dak., 1899, provides, "All persons sentenced to the punishment of imprisonment in the penitentiary and committed thereto shall be constantly employed for the benefit of the state. No communication shall be allowed between such persons and any person without the penitentiary except under such supervision as may be prescribed by the rules and regulations thereof. No person shall, without the consent of the warden, bring into or carry out any writing or any information to or from any inmate of the penitentiary. Persons committed to the penitentiary shall be confined in separate cells at night, whenever there are cells sufficient, and in the daytime all intercourse between them shall be prevented as far as practicable. All communications between male and female inmates shall be prevented."

The prisoner is, therefore, committed to a prison where he is to be kept in close con-

finement, which, at least must mean, that he must be kept in a cell; he is committed to a prison in which, under the law regulating the imprisonment of all other prisoners, all communication and all intercourse between the inmates is prohibited, and in which no communication between the prisoner and persons without the penitentiary, except under such supervision as may be prescribed by the rules and regulations of the prison, is permitted.

This character of inprisonment is substituted "Instead of confinement in the ordinary county prison of the place where he and his friends reside; where they may, under the control of the sheriff, see him, and visit him; where the sheriff and his attendants must see him; where his religious adviser and his legal counsel may often visit him without any hindrance of law on the subject."

In the opinion of the State Supreme Court in this case, it is stated in several places that it is contended that, this sentence being for six months and nine days, or nine days more than the maximum imprisonment under the former statute, the nine days additional imprisonment constitutes, in part, the increased or added punishment of which we complain. There is some error about this. Our contention in the State Court, as here, was that the statute under which the defendant is sentenced is, as to him and the crime

of which he was convicted, ex post facto and void, and that no sentence and no judgment can be given against him under that statute, and that since the statute in force at the time of the commission of the offense charged has been repealed without a saving clause, no judgment and no sentence can be passed against the plaintiff in error.

We are dealing with the question of the constitutionality of this statute, and nothing else. If the statute is constitutional, the judgment must stand. If it is unconstitutional, it must be vacated and set aside. We are not now, and never have been concerned with the particular terms of the judgment entered.

It is settled law that "No one can be criminally punished in this country, except according to the law prescribed for his government by the sovereign authority before the imputed offense was committed, or by some law passed afterwards by which the punishment is not increased." The State Supreme Court has held in this case that imprisonment in the penitentiary not less than six months nor more than nine months in close confinement, as compared with confinement in the county jail not less than three nor more than six months, is not an increase of the punishment.

We most respectfully submit that the judgment of the Supreme Court of the State should be reversed.

SETH NEWMAN,
B. F. SPALDING,
Attorneys for Plaintiff in Error.

IN SUPREME COURT of the UNITED STATES

JOHN ROONEY,

Plaintiff in Error,

vs.

THE STATE OF NORTH DAKOTA,

Defendant in Error.

Brief of Defendant in Error

I.

POINTS AND ARGUMENTS.

The plaintiff in error seems to make but one point in his brief. It is stated on page 12 as follows: "Is the statute under which judgment was entered and sentence pronounced, as applied to the plaintiff in error, and the crime of which he was convicted *ex post facto* and void? This is the sole question in this case." And contends on

pages 11 and 12 that it is *ex post facto* for the following reasons:

1st. That three months are added to the term of imprisonment before the execution;

2nd. That, under the former law, the imprisonment before the execution in case there was no jail in the county in which conviction was held or where the jail in such county was deemed insecure, unfit or unsafe was in another convenient county in the state; under the latter, an amended law, such imprisonment is in the penitentiary of the state, and in close confinement;

3rd. Under the former law, the defendant was to be executed in the county in which he was convicted by the sheriff of such county or his deputy; under the latter law, the defendant is to be executed in the penitentiary of the state by the warden or his deputy.

It is conceded that the material differences between the old and the new law have been correctly stated, but plaintiff in error contends that by these changes in the law the punishment of the convict is increased and is therefore *ex post facto* and void.

First. This necessitates a determination of what is an *ex post facto* law. Was the statute (Ch. 99, Laws of 1903) under which this judgment was

entered *ex post facto* and void, as applied to plaintiff in error?

The passage of *ex post facto* laws is inhibited by both the federal and state constitutions, and, in commenting upon this, the Supreme Court of the United States has said: "The plain and obvious meaning and intention of the prohibition is this, that the legislatures of the several states shall not pass laws after a fact done by a subject or citizen which shall have relation to such fact and shall punish him for having done it. A prohibition considered in this light is an additional bulwark in favor of the personal security of the subject, to protect his person from punishment by legislative acts having a retrospective operation."

Calder vs. Bull, 3 Dall., 386; 391 L. Ed., 648.

Justice Chase, in his enumeration of laws which he considered *ex post facto* under this prohibition specified, "*every law that changes the punishment and inflicts a greater punishment than the law annexed to the crime when committed.*" (Colorado vs. Bull, 3 Dall., 390; L. Ed., 648; Cooley Const. Lim., 322). "But," he stated, "I do not consider any law *ex post facto* within the prohibition that mollifies the rigor of the criminal law,

but only those that create or aggravate the crime or increase the punishment or change the rule of evidence for the purpose of conviction."

Justice Washington declared an *ex post facto* law to be any law "which in its operation makes that criminal or penal which was not so at the time the act was performed, or which increases the punishment; or, in other words, which in relation to the offense or its consequences alters the situation of a party to his disadvantage."

U. S. vs. Hall, 26 Fed. Case, 84; affirmed in 6 Cranch, 171; 3 L. Ed., 189.

King vs. Mo., 107 U. S., 221; 2 Sup. Ct., 443; 27 L. Ed., 506.

Hopt vs. Utah, 110 U. S., 574; 4 Sup. Ct., 202; 28 L. Ed., 262.

In re Medley, 134 U. S., 160; 10 Sup. Ct., 384; 33 L. Ed., 835, etc.

Chief Justice Marshall defined an *ex post facto* law, "punishable in a manner in which it was not punishable when committed."

Cummings vs. Mo., 4 Wall, 277. 18 L. Ed., 356.

Ex parte Garland, 4 Wall, 333; 18 L. Ed., 366.

As to Justice Marshall's definition of an *ex post facto* law, Justice Peckham (now of the Supreme Court of the United States), for the Court of Appeals in New York, in State vs. Hayes, 140 N. Y., 484; 35 N. E., 951; 23 L. R. A., 830; 37 Am. St. Rep., 572, said: "That it materially affects the punishment prescribed for a crime is not the true test of an *ex post facto* law. In regard to punishment it must affect the offender unfavorably before it can be thus denominated. It seems to us plain that there can be no reason for any other view. I do not think that the mere reason of an alteration in the manner of punishment without reference to the question of mitigation necessarily renders an act obnoxious to the constitutional provision. * * * * I think that where a change is made in the manner of the punishment, if the change be of that nature which no sane man could by any possibility regard in any other light than that of a mitigation of punishment, the act would not be *ex post facto*, where made applicable to offenses committed before its passage."

From these definitions we are led to conclude that in order for a law to be *ex post facto* it must be such an one that creates or aggravates the crime or increases the punishment or changes the rule of evidence for the purposes of conviction. Or, in other words, it is a law which changes the

punishment and inflicts a greater punishment than the law annexed to the crime when committed.

Does the extending of the time of execution three months impose additional punishment or burden upon the convict by way of penalty? And it must be borne in mind in this connection that this additional time of three months gives to the Trial Court a discretion, but in no wise compels the Court to exercise this discretion.

Suppose the lawmakers, when amending Sec. 8305, had said that the execution should take place within twenty-four hours. There could have been no possible contention in that case that it was not an increased penalty, that additional punishment had been inflicted by depriving plaintiff of that very wise and humane provision requiring at least ninety days to elapse between the sentence and execution.

If this is sound, does it not follow that a Court in exercising the discretion vested in it by the new law has not increased the penalty or punishment, but mitigated as much as possible when the sentence is death? Can it be successfully contended that to grant an additional time to live imposes additional punishment upon the defendant? Life is sweet to all. The postponement by operation of this statute cannot be considered as a prolongation of the suffering and, therefore,

added punishment. "It is believed that the common instinct of mankind, when sane, is in favor of life and its prolongation. Death is the extreme penalty that can be inflicted. Any change in the penalty short of that is considered a mitigation and postponement of the time of its infliction is also a mitigation." In Com. vs. Gardner, 11 Gray, 438.

In Com. vs. Wyman, 12 Cush., 239.

Cooley on Const. Lim., Sec. 272.

In re Tyson, 13 Colo., 487; L. R. A., 472.

"If the shortening of the life for a single day is to the disadvantage of the convict, the extending of life for a day or three months must be considered to his advantage."

In Territory vs. Miller, 4 Dak., 173, 181; 29 N. W., 711.

State vs. Rooney, 95 N. W. (N. D.), p. 517.

II.

Does the fact that the convict, under the new law, is to be kept in the penitentiary in close confinement instead of in the county jail, either in the

county where convicted or in some other county of the state, in a cell, increase the punishment over any it was in the power of the Court to impose under the old law and thus increase the severity of the punishment of the convict? And plaintiff cites *ex parte* Medley, 134 U. S., 106; L. Ed. B. 33, p. 835, as well as the case of People vs. McNulty, page 13 of his brief, to substantiate his contention in the two preceding propositions.

Defendant in error contends that the words "close confinement," as used in the statute and sentence, mean nothing more than that the convict is to be *safely* and *securely* kept in confinement pending the execution of the judgment of death; that this adds nothing to the rigor of the former statute, Sec. 8320, which permitted the officer having in charge the convict to transfer and keep him in the jail of another county, where he could be safely and securely confined when under judgment of death, when he deemed the jail in his own county insecure or unsafe. As says Judge Cochrane in the State vs. Rooney, supra: "Safety and security through confinement being the unchanged purpose of both statutes, neither before nor since the act of March 9 could one convicted of a capital offense be admitted to bail. Appellant is entitled to as many privileges now in the penitentiary as the sheriff, under the former

law, could accord to him in the county jail. No additional restrictions are placed upon his seeing his legal or spiritual adviser or members of his own family. This statute works no change insofar as it describes his confinement as close, nor is the word "close" synonymous with the word "solitary" as the latter term is used in the Medley case. It is there pointed out that the word "solitary" has a well defined and well understood legal signification. The change made in the Colorado statute, construed in the Supreme Court in the Medley case, was from a close confinement in a jail, where the convict could be visited in the place of his confinement by his family, his legal, spiritual or medical adviser without restriction, to solitary confinement which excluded the possibility of such visits and inhibited them except under the restrictions of prison rules which might prohibit them altogether. The inference that plaintiff in error in citing the Medley case would have us draw that the penitentiary is intended for solitary confinement, that under the law regulating the control of convicts in the penitentiary and the rules of prison discipline in this state, he is shut out from seeing all human beings is answered in this: "That the law has not been changed in this regard from what it was when his offense was committed; the statute then and it now requires close confinement,

as we have already shown. Neither the law, the judgment nor the commitment requires solitary confinement. *No presumption can be indulged that the officers of the penitentiary charged with the execution of the judgment of the Court will go beyond the letter of its mandate and make appellant's confinement solitary,* in fact, when there was no legal authority therefor and when to do so would, as to appellant, be illegal." Holden vs. State, 137 U. S., 483; 11 Sup. Ct., 143; 34 L. Ed., 734.

(*a*) The fact that, under the new law, the penitentiary is in another part of the state from the county in which the convict was tried and by being held there may be somewhat remote from his friends is of little moment, for, under the former statute, he could be removed and confined in a jail in another part of the state. (Sec. 8320, Rev. Codes, 1899). The old law, all the time, has required the confinement and safe keeping of persons convicted of capital offenses between the time of sentence and execution.

"The confinement is no part of the punishment, but is an incident connected therewith, referable to penal administration as its primary object."

In re Tyson, 13 Colo., 487; 22 Pac., 810; 6 L. R. A., 472.

In Holden vs. State, 107 U. S., 483; 34 L. Ed., 734.

The Medley case, supra, can avail the plaintiff in error nothing. That case was decided upon two propositions: First, the fact that solitary confinement, as it is legally understood, was added to the punishment; second, the withdrawal from the prisoner knowledge of the time when his execution should take place; that is, this condition of uncertainty might exist for four weeks.

In the Medley case, supra, cited by plaintiff, it was not the opinion of an undivided Court. Two of the learned jurists on that bench dissented, and Justice Brewer in his opinion contended that the Court had violated the maxim "*De minimis non curat lex.*"

And the California Court finally succeeded in reaching a conclusion in harmony with the sentiment of Justices Brewer and Bradley, "whereby a convicted murderer was not permitted to escape the death he deserves and be turned loose on society."

People vs. McNulty, 93 Cal., 427; 29 Pac., 61; 26 Pac., 598; 28 Pac., 816.

III.

Does the fact that the defendant, under the new law, is to be executed at the penitentiary by the warden or his deputy instead of, under the old law, being executed in the county in which he was convicted by the sheriff or his deputy bring the new and amended statute within the constitutional inhibition? Counsel does not specifically state but we infer that he contemplates that to be hung by the warden and in a penitentiary is to bring opprobrium and increased moral obloquy upon the convict's name and character. If this is his intent we reply, nothing can aggravate the disgrace and infamy following a capital conviction for willful, deliberate and premeditated murder.

In re Tyson, 30 Colo., 487; 22 Pac., 810; 6 L. R. A., 472.

He is branded by the verdict of the jury as a felon, unfit to live longer. His offense was infamous. The Court has pronounced upon him the sentence of death.

IV.

Counsel for plaintiff, by citing the McNulty case, may intend to put in question the *jurisdiction* of the Court to determine the question whether or

not the change in this law works to the advantage or disadvantage of the convict. In other words, which would be the severer punishment, imprisonment for thirty days longer before hanging, under the new law, or death by hanging thirty days earlier, under the old law, would depend upon the disposition or temperament of the convict, and, therefore, not for the Court to decide.

This contention may have had support in the case of Hartung vs. People, 22 N. Y., 695, but has since been condemned by the Court of Appeals of New York and by the Courts of many other states, and we contend it is a question of law, pure and simple, and for the Courts to decide.

> See People vs. Hayes, 140 N. Y., 488; 35 N. E., 951; 23 L. R. A., 830; 37 Am. St. Rep., 572, and other cases cited by Mr. Justice Cochrane in 95 N. W., p. 518.

Counsel for plaintiff inquires, p. 12 of his brief: "Is the statute under which judgment was entered and sentence pronounced, as applied to the plaintiff in error, and the crime of which he was convicted, *ex post facto* and void?" And again, on page 19, "We are dealing with a question of the constitutionality of this statute and nothing else.

If the statute is constitutional, the judgment must stand; if it is unconstitutional, it must be vacated and set aside." From this we understand his position to be that, in the event the Court should find this amended law unconstitutional and void, the prison doors would be open and John Rooney would be given his liberty. In other words, if the Court should find that this new and amended law is *ex post facto* and, therefore, unconstitutional, then the question would naturally and necessarily arise as to the operation and effect of the saving clause. For, if there is nothing in the new statute itself to show this legislative intent and our general saving clause, Sec. 5142, Rev. Codes of 1899, does not operate, then the defendant, John Rooney, must be let go to menace and prey upon society. On the other hand, if this amended law is *ex post facto,* unconstitutional and void, and the legislative intent from the act itself divulges a requisite saving clause, or, failing in that, said Sec. 5142 so operates as to give effect to the penalty under the old statute, then Rooney must hang and pay the penalty of his crime.

From a reading of Sec. 17 of the new statute, supra, it appears that the legislature attempted to reach past offenses as well as future ones.

(*a*) Assuming, for the sake of argument, that the law, by reason of the above attempt, is

ex post facto, can it be maintained that the legislature intended to release all past offenders charged with murder and condemned to death? Clearly not, the very opposite intent is expressed in the act.

(*b*) Would the legislature have passed this act at all with knowledge that it could not be carried out as an entirety? From a reading of Sec. 17, it plainly appears that the governing motive in its passage was the saving of expense.

(*c*) "It is a familiar principle of law that in considering the question as to the effect that a later statute has upon a former statute upon the same subject, by way of repealing the same, the intent of the legislature is to be followed when it is apparent, unless such intent is inconsistent with the express language of the new statute."

People vs. Lambier, 5 Denio, 9.
Smith vs. The People, 47 N. Y., 336.
Mongeon vs. The People, 55 N. Y., 613.

(*d*) That a new statute should in no case be construed to work a repeal of existing law when such construction will necessarily prevent the punishment of crime or work a public mischief, unless no other reasonable construction can be given to it. See cases last above cited.

Again: Sec. 5142 of the Rev. Codes of 1899, which is a copy of Sec. 13, Revised Statute of the United States, reads as follows: "The repeal of any statute by the legislative assembly shall not have the effect to release or extinguish any penalty, forfeiture or liability incurred under such statute unless the repealing act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any particular action or prosecution for the enforcement of such penalty, forfeiture or liability." What did the legislature mean by the words, "shall expressly provide?" Does it mean that the legislature should directly, specifically and with positive certainty, giving no form of opportunity for doubt, quibble or question, or that they designed and intended that the enactment should apply to and extinguish penalties, forfeitures or liabilities incurred under such prior act? What did they say in their repealing clause under the act of March 9, 1903? "All acts and parts of acts in conflict with the provisions of this act are hereby repealed." This section in no wise refers to penalty, only to procedure, for the simple reason that the punishment for murder is unchanged by the new act.

Again: Let us read Sec. 17 in connection with Sec. 16. We find that the legislature, implied-

ly at least, continues in force and effect the same penalty as under the old law, to-wit: hanging.

If the contention of counsel should be that there is no saving clause in the act of March 9, this could be of no force for the reason that it is read into every enactment of this character unless expressly *stated to the contrary.*

Gould & Tucker, in their notes of the Revised Statutes of the U. S., Vol. 1, p. 3, say, that the words penalty, liability and forfeiture as used in this section are synonymous with punishment, and say that under this provision the repeal of an act defining a crime and its punishment does not prevent the prosecution and conviction of a party for its prior violation. U. S. vs. Barr, 4 Sawyer, 254. It covers a prosecution under a statute which authorizes an imprisonment as well as a fine.

U. S. vs. Matthews, 23 F. R., 74.
U. S. vs. Ulrici, 3 Dil., 532.
Suth. on Const., Sec. 225 and Sec. 226.

And it forms a part of every repealing statute passed since its enactment in 1871 and not manifesting a different intent. Cases cited.

If the Court finds that Sec. 5142 acts as a saving clause and must be read into the law of 1903, then all question and difficulty in this case fades

away. It does not become necessary to struggle with the question of *ex post facto*, greater or lesser punishment, constitutionality or unconstitutionality of said law. It simply remains for the Court to order the Trial Court to proceed according to the law as it existed.

In re Parks, 45 N. W., 824.
People vs. Bemis, 16 N. W., 794.
Ex parte Gilmore, 12 Pac., 80.
State vs. Marple, 14 Pac., 521.
Ratzky vs. People, 29 N. Y., 127.

Errors and mistakes not regarded unless they prejudice or tend to prejudice defendant in a substantial right.

8423 Rev. Codes, N. D.

If, however, the Court holds that law in full force and effect as amended, from the time of its enactment, and applies to the case at bar in its entirety, and that it is in no manner obnoxious to the constitutional provision against *ex post facto* laws, then, in that event, the decision of our Supreme Court should be affirmed.

But, if the Court holds that Sec. 5124 of the

Revised Codes of North Dakota does not act as a saving clause, then the statute in question has a retroactive effect and that it is *ex post facto* so far as the same relates to the case at bar and is, therefore, unconstitutional and void, then the enactment of 1903 is wholly void and unconstitutional for reasons heretofore expressed by Judge Cooley and the Court in the case of McNulty vs. People, 28 Pac., 816; or, if the Court holds that Sec. 5124 is read into the act of March 9, 1903, then this case should be remanded with instructions to sentence under the old law.

Respectfully submitted,

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Of Counsel,

Fargo, North Dakota.

Supreme Court of the United States.

No. 123.—October Term, 1904.

John Rooney, Plaintiff in Error, vs. The State of North Dakota. } In error to the Supreme Court of the State of North Dakota.

[January 23d 1905.]

Mr. Justice Harlan delivered the opinion of the Court.

This writ of error brings in question a final judgment of the Supreme Court of the State of North Dakota, affirming the judgment of an inferior court of that State, by which pursuant to the verdict of a jury the plaintiff in error John Rooney was sentenced to death for the crime of murder in the first degree.

The sole question upon which the plaintiff in error seeks the judgment of this court, and the only one that will be noticed, is whether the statute under which he was sentenced was *ex post facto* and therefore unconstitutional in its application to his case. His counsel agrees that the judgment must stand if the statute be constitutional.

Before as well as after the passage of the statute under which the sentence was pronounced the punishment prescribed by the State for murder in the first degree was death or imprisonment in the penitentiary for life. *Rev. Codes, N. D.* 1889, § 7068.

By the statutes in force at the time of the commission of the offence, August 26th 1902, as well as when the verdict of guilty was rendered, it was provided that when a judgment of death is rendered the judge must deliver to the sheriff of the county a warrant stating the conviction and judgment, and appointing a day on which the judgment is to be executed, "which must not be less than three months after the day in which judgment is entered, and not longer than six months thereafter." § 8305; that when there was no jail within the county, or whenever the officer having in charge any person under judgment of death deemed the jail of the county where the conviction was had insecure, unfit or unsafe for any cause, he could confine the convicted person in the jail of any other convenient county of the State, § 8320; that the judgment of death should be executed within the walls or yard of the jail of the county in which the conviction was had, or within some convenient enclosure within such county, § 8321; and that judgment of death must be executed by the sheriff of the county where the

conviction was had, or by his deputy, one of whom at least must be present at the execution. *Rev. Codes of N. D.* 1899, *pp.* 1622–3.

The sentence of death was pronounced March 31st 1903. Prior to that date, namely, on March 9th 1903, the Legislature—without changing the law prescribing death or imprisonment for life as the punishment for the crime of murder in the first degree—passed an act providing that all executions should take place at the penitentiary, and amending certain sections of the Revised Codes of 1899. By that act it was provided:

"§ 1. The mode of inflicting the punishment of death shall be by hanging by the neck until the person is dead; and the warden of the North Dakota penitentiary, or in case of his death, inability or absence, the deputy warden, shall be the executioner; and when any person shall be sentenced, by any court of the State having competent jurisdiction, to be hanged by the neck until dead, such punishment shall only be inflicted within the walls of the North Dakota penitentiary at Bismarck, North Dakota, within an enclosure to be prepared for that purpose under the direction of the warden of the penitentiary and the board of trustees thereof, which enclosure shall be higher than the gallows, and so constructed as to exclude public view."

"§ 3. When a person is sentenced to death, all writs for the execution of the death penalty shall be directed to the sheriff by the court issuing the same, and the sheriff of the county wherein the prisoner has been convicted and sentenced shall, within the next ten days thereafter, in as private and secure a manner as possible to be done, convey the prisoner to the North Dakota penitentiary, where the said prisoner shall be received by the warden, superintendent or keeper thereof, and securely kept in close confinement until the day designated for the execution. . ."

"§ 14. That section 8305 of the Revised Codes of 1899, relating to judgment of death, warrant to execute, be amended so as to read as follows: § 8305. When the judgment of death is rendered the judge must sign and deliver to the sheriff of the county a warrant duly attested by the clerk under the seal of the court, stating the conviction and judgment, and appointing a day upon which the judgment is to be executed, which must not be less than six months after the day in which the judgment is entered, and not longer than nine months thereafter."

"§ 16. All acts and parts of acts in conflict with the provisions of this act are hereby repealed." *Laws of N. D.* 1903, *c.* 99, *p.* 119.

By the sentence it was ordered that the accused be conveyed to the State penitentiary, "there to be kept in close confinement until October the ninth 1903," and, within an enclosure in that building to be erected for the purpose, be hung by the warden of the penitentiary, or in case of his inability to act or his absence therefrom, by the deputy warden, before the hour of sunrise on the day fixed for the execution.

It appears from the statement of the case that the statutes in force when the sentence of death was pronounced differed from those in force when the crime was committed and when the verdict was rendered, in these particulars:

1. By the later law, close confinement in the penitentiary for not less than six months and not more than nine months, after judgment and before execution, was substituted for confinement in the county jail for not less than three months nor more than six months after judgment and before execution.

2. By the later law, hanging, within an enclosure at the penitentiary by the warden or his deputy, was substituted for hanging by the sheriff within the yard of the jail of the county in which the conviction occurred.

We are of opinion that in the particulars just mentioned the statute of 1903 is not repugnant to the constitutional provision declaring that no State shall pass an *ex post facto* law. It did not create a new offence nor aggravate or increase the enormity of the crime for the commission of which the accused was convicted, nor require the infliction upon the accused of any greater or more severe punishment than was prescribed by law at the time of the commission of the offence. The changes, looked at in the light of reason and common sense and applied to the present case, are to be taken as favorable rather than as unfavorable to him. It may be sometimes difficult to say whether particular changes in the law are or are not in mitigation of the punishment for crimes previously committed. But it must be taken that there is such mitigation when by the later law there is an enlargement of the period of confinement prior to the actual execution of the criminal by hanging. The giving, by the later statute, of three months' additional time to live, after the rendition of judgment, was clearly to his advantage, for the court must assume that every rational person desires to live as long as he may. If the shortening of the time of confinement, whether in the county jail or in the penitentiary before execution, would have increased, as undoubtedly it would have increased, the punishment to the disadvantage of a criminal sentenced to be hung, the enlargement of such time must be deemed a change for his benefit. So that a statute which mitigates the rigor of the law in force at the time a crime was committed cannot be regarded as *ex post facto* with reference to that crime. *Calder* v. *Ball*, 3 *Dall.* 386, 391, *Chase, J.*; *Story's Const.* § 1345; *Cooley's Const. Lim.* *267; *Com'th* v. *Gardner*, 11 *Gray*, 443; 1 *Bishop's Crim. Law*, § 280. Besides, the extension of the time to live, given by the later law, increased the opportunity of the accused to obtain a pardon or commutation from the Governor of the State before his execution.

Nor was the punishment, in any substantial sense, increased or made more severe by substituting close confinement in the penitentiary prior to execution for confinement in the county jail. It is contended that

"close confinement" means "solitary confinement," and *Medley's case*, 134 *U. S.* 160, is cited in support of the contention that the new law increased the punishment to the disadvantage of the accused. We do not think that the two phrases import the same kind of punishment. Although solitary confinement may involve close confinement, a criminal could be kept in close confinement without being subjected to solitary confinement. It cannot be supposed that any criminal would be subjected to solitary confinement when the mandate of the law was simply to keep him in close confinement.

Again, it is said that the law in force when the crime was committed only required confinement, whereas the later statute required *close* confinement. But this difference of phraseology is not material. "Confinement" and "close confinement" equally mean such custody, and only such custody, as will safely secure the production of the body of the prisoner on the day appointed for his execution.

The objection that the later law required the execution of the sentence of death to take place within the limits of the penitentiary rather than in the county jail, as provided in the previous statute, is without merit. However material the place of confinement may be in case of some crimes not involving life, the place of execution, when the punishment is death, within the limits of the State, is of no practical consequence to the criminal. On such a matter he is not entitled to be heard.

The views we have expressed are in accord with those announced by the Supreme Court of North Dakota. *State* v. *Rooney*, 12 *N. D.* 144, 152.

We are of opinion that the law of 1903 did not alter the situation to the material disadvantage of the criminal, and, therefore, was not *ex post facto* when applied to his case in the particulars mentioned.

Judgment affirmed.

True copy.

Test:

Clerk Supreme Court, U. S.